U.S. Department of Justice

Environment and Natural Resources Division

DJ # 90-5-2-3-20760

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Via CM/ECF

June 1, 2016

Re: *State of Texas, et al. v. EPA*, No. 16-60118, United States Environmental Protection Agency's Letter Brief in Support of its Motion to Dismiss or, in the Alternative, Transfer to the D.C. Circuit

To the Fifth Circuit Court of Appeals:

The United States Environmental Protection Agency ("EPA") is pleased to provide this letter brief in response to the Court's request on May 17, 2016, for additional briefing addressing EPA's motion to dismiss or transfer (Doc. 513434396, herein "Mot.").

The issue presented to the Court by EPA's Motion is straightforward: did EPA, pursuant to 42 U.S.C. § 7607(b)(1), find and publish that the Final Rule[1] at issue in this case is based on a determination of nationwide scope or effect? The answer is indisputably yes. 81 Fed. Reg. 296, 346, 349 (Jan. 5, 2016). Thus, regardless of whether section 7607(b)(1) is a limit on jurisdiction or a mandatory venue provision, this Court must either dismiss the petitions for review or transfer them to the D.C. Circuit because Congress has clearly provided that these petitions "may be filed *only*" in the D.C. Circuit.

Consistent with this mandatory direction by Congress, this Court should decline to rule on the motions for stay. Should the Court so desire, it can elect to transfer the fully-briefed motions for stay with the petitions for review to the D.C. Circuit. *See, e.g.*, *Texas v. EPA*, No. 10-60961, 2011 WL 710598 at *5 (5th Cir. Feb. 24, 2011) (Order of this Court granting "EPA's motion to transfer this case, together with

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[1] "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze," 81 Fed. Reg. 296 (Jan. 5, 2016).

any pending motions and documents of record," to the D.C. Circuit). There is no reason to believe the D.C. Circuit will not act promptly.

To provide some brief background about the Final Rule: To comply with Congress' requirement to improve visibility at some of our nation's most treasured resources, national parks and wilderness areas in Texas and Oklahoma, EPA promulgated the long-overdue Final Rule under the Clean Air Act ("CAA"). The Final Rule requires certain Texas power plants to reduce air pollution by installing the same type of cost-effective controls that plants elsewhere, including in Oklahoma (at a total cost of almost $1 billion), have already been required to install. Complex issues pertaining to the spread of visibility-impairing haze from Texas to Oklahoma led EPA in the Final Rule to clarify its interpretations of nationally-significant statutory and regulatory provisions in order to provide guidance to *all* States. EPA therefore made and published a finding that the Final Rule is based on a determination of nationwide scope or effect. EPA moved to dismiss or transfer the petitions for review of the Final Rule filed in this Court because such petitions may be filed only in the D.C. Circuit.

I. EPA Has Made and Publishing a Finding that the Final Rule Is Based on a Determination of Nationwide Scope or Effect.

This Court has had previous occasion to consider the operation of CAA section 7607(b)(1). In *Texas v. EPA*, No. 10-60961, the Court issued a thorough decision granting a motion by EPA to dismiss that case or, in the alternative, transfer it to the D.C. Circuit. The Court began its analysis by observing that section 7607(b)(1) "lays exclusive venue in the D.C. Circuit for review of regulations that either apply nationally or apply locally but have nationwide scope or effect.." 2011 WL 710598, at *3. Accordingly, the Court explained that the statute sets forth a two-step inquiry. *Id.* The first step is to ask whether the EPA action at issue "applies nationally or locally." *Id.* If nationally, the inquiry ends. *Id.* "But where a regulation applies locally or regionally, we must also ask whether EPA has made and published a finding that the regulation is based on a determination of nationwide scope and effect." *Id.*

In *Texas v. EPA*, the Court's inquiry ended with the first step because the regulation at issue applied nationally. The Court accordingly granted EPA's motion and transferred the petitions for review to the D.C. Circuit. *Id.* at *4. Here, it is undisputed that the Final Rule applies locally or regionally, and therefore the Court must proceed to the second step of its inquiry: "whether EPA has made and published a finding that the regulation is based on a determination of nationwide scope or effect." *Id.* at *3.

The answer here is indisputably yes. EPA made a finding that the Final Rule is based on a determination of nationwide scope or effect for two independent reasons. First, EPA announced in the Final Rule its clarified interpretations of statutory and regulatory provisions pertaining to the transport of haze between states.[2] The clarified interpretations guide *all* of the States, and EPA, in the implementation of the regional haze program, and are thus a determination of nationwide scope or effect. As discussed in detail below and in both EPA's Motion and its Reply (Doc. 513485025), the interstate transport of visibility-impairing haze between Texas and Oklahoma is at the core of EPA's evaluation of Texas's and Oklahoma's State Implementation Plan ("SIP") submissions, and EPA's rationale in promulgating the Federal Implementation Plan ("FIP").

As EPA explained in the Proposed Rule, the effect of emissions from Texas point sources (particularly power plants) on the Wichita Mountains National Wildlife Refuge in Oklahoma are *several times greater* than the emissions from Oklahoma sources. 79 Fed. Reg. 74,818, 74,821-22 (Dec. 16, 2014). The impact of Texas sources is so significant that "even if every source in Oklahoma were fully controlled," visibility in the Wichita Mountains would not be on track in 2018 to meet Congress' natural visibility goal without emission reductions from upwind sources—primarily Texas. *Id.* at 74,822.

Evaluating the reasonable progress goals in Texas's and Oklahoma's SIPs thus presented "intricately intertwined issues," *id.*, and it was also evident that discussions between Texas (the upwind state) and Oklahoma (the downwind state) had been problematic. *Id.* Despite the fact that Oklahoma could not achieve reasonable progress in the Wichita Mountains without emission reductions from Texas, Texas's SIP did not require reductions from any source for purposes of improving visibility at Texas's Class I areas or at such areas in nearby states, including the Wichita Mountains. *Id.* at 74,833, 74,843. EPA thus determined that "it is necessary at this time to provide clarification to the states on this issue," meaning *all* states, not just Texas and Oklahoma. *Id.* at 74,823.

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[2] Put more simply, and as explained in greater detail in EPA's Motion at 8-10, 11-13, EPA announced its clarified interpretations of the respective authorities and obligations of upwind and downwind States when developing regional haze implementation plans. We refer to this issue as the interstate transport of visibility-impairing emissions (i.e., haze).

EPA proceeded to clarify its interpretations of the CAA's and the Regional Haze Rule's[3] nationally-applicable provisions that apply to interstate visibility transport. *Id.* at 74,823-30. EPA's clarified interpretations apply to and guide *all* states. 81 Fed. Reg. at 349. They will assist States in developing regional haze SIPs in future planning periods. *Id.* The Final Rule is therefore based on precisely the type of forward-looking determination, applicable to every state, that is "of nationwide scope or effect" within the meaning of section 7607(b)(1). This is confirmed by the fact that in a recent Notice of Proposed Rulemaking, EPA proposed to revise the nationally-applicable Regional Haze Rule by, *inter alia*, codifying EPA's clarified interpretations announced in the Final Rule. 81 Fed. Reg. 26,942, 26,952 & n.23 (May 4, 2016). Dismissal or transfer of these petitions will further Congress's intent that EPA actions under the CAA of national significance be subject to consistent review by one court: the D.C. Circuit. *See Texas v. EPA*, 2011 WL 710598 at *4.

Second, EPA premised its finding on the equally dispositive fact that the determination in the Final Rule has scope or effect in two different judicial circuits: this Court and the Tenth Circuit. 81 Fed. Reg. at 346, 349. The legislative history clearly supports EPA's authority to find that a regionally-applicable final action that could involve multiple circuits is based on a determination of nationwide scope or effect. *See PPG Indus., Inc. v. Harrison*, 587 F.2d 237, 243 n.6 (5th Cir. 1979), *rev'd on other grounds*, *Harrison v. PPG Indus., Inc.,* 446 U.S. 578 (1980) (quoting CAA legislative history: "[I]f an action of the Administrator is *found by him* to be based on a determination of nationwide scope or effect (including a determination which has scope or effect *beyond a single, judicial circuit*), then *exclusive* venue for review is in the [D.C. Circuit] . . . .") (emphases added). This furthers Congress's clearly-stated intent to avoid the possibility of inconsistent review by centralizing review in the D.C. Circuit pursuant to the statute. *Id.*

Having established that EPA made a finding that the Final Rule is based on a determination of nationwide scope or effect, the remaining question is whether EPA published its finding. The Final Rule proves the answer is yes:

> First, we proposed to find and have confirmed our finding in this final rule that our action on the Texas and Oklahoma regional haze SIPs, which includes the promulgation of a partial FIP for each state, is based on a determination of nationwide scope and effect. Second, we have published that finding in the Federal Register.

[3] The Regional Haze Rule sets out the requirements for regional haze SIPs, and is codified at 40 C.F.R. § 51.308.

81 Fed. Reg. at 346. *See also id.* at 349. As such, and in accord with the Court's discussion in *Texas v. EPA*, the inquiry is at an end because EPA "made and published a finding that the [Final Rule] is based on a determination of nationwide scope and effect." *Texas v. EPA*, 2011 WL 710598 at *3.

II. In Light of EPA's Finding that the Final Rule is Based on a Determination of Nationwide Scope or Effect, this Court Must Dismiss the Petitions or Transfer them to the D.C. Circuit.

Having established that EPA found that the Final Rule is based on a determination of nationwide scope or effect (for two reasons), and that EPA published its finding in the Federal Register, the petitions for review must be dismissed or transferred to the D.C. Circuit. The plain language of section 7607(b)(1) mandates this outcome, and no further inquiry in this Court is appropriate.

A. Review of EPA Actions that EPA Has Found Are Based on a Determination of Nationwide Scope or Effect Is Available Exclusively in the D.C. Circuit.

As the Court recognized in *Texas v. EPA*, "review of regulations that either apply nationally or apply locally but have nationwide scope or effect" is available exclusively in the D.C. Circuit. 2011 WL 710598, at *3. This reflects the statute's clear direction that petitions for review of such rulemakings may be *filed only* in the D.C. Circuit. This effectuates Congress' intent that only the D.C. Circuit review such actions "to ensure uniformity in decisions concerning issues of more than purely local or regional impact." *NRDC v. EPA*, 512 F.2d 1351, 1357 (D.C. Cir. 1975).

With it being clear that EPA made and published a finding that the Final Rule is based on a determination of nationwide scope or effect, no further review by this Court is necessary or appropriate. The proceedings in the D.C. Circuit in *Alcoa, Inc. v. EPA* are illustrative. There, several petitions for review of EPA's final action involving the 8-hour ozone National Ambient Air Quality Standard were filed in the D.C. Circuit. In that final rule, EPA made and published a finding that its action was based on a determination of nationwide scope or effect. 69 Fed. Reg. 23,858, 23,875 (Apr. 30, 2004). Alcoa, presumably disagreeing with that determination, moved to transfer its own petition for review to the Seventh Circuit. The D.C. Circuit denied Alcoa's motion to transfer, explaining:

> Under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the Administrator has unambiguously determined that the [Final Rule] has nationwide scope and effect. Accordingly, all petitions for review of this action belong in this Circuit. *See* 42 U.S.C. § 7607(b)(1).

Alcoa, Inc. v. EPA, No. 04-1189, 2004 WL 2713116, at *1 (D.C. Cir. Nov. 24, 2004).

Notably, the D.C. Circuit's order does not reflect that the court reviewed EPA's finding that that rulemaking was based on a determination of nationwide scope or effect for arbitrariness or capriciousness, nor that the court made a *de novo* review of that rulemaking to reach an independent conclusion as to whether it was based on such a determination. To the contrary, the D.C. Circuit mechanically applied the statute in finding that *the Administrator* had "unambiguously" made a nationwide-scope-or-effect determination, and therefore all petitions for review belonged in the D.C. Circuit. The D.C. Circuit's application of the statute is fully consistent with the inquiry described by this Court in *Texas v. EPA*, and the same application of the statute here results in the same outcome: all petitions for review of the Final Rule belong in the D.C. Circuit.

This Court has not ruled on whether section 7607(b)(1)'s forum provisions[4] are jurisdictional or mandatory venue provisions. *Id.* at *3 n.28. However, as the Court has recognized, where a petition for review must be dismissed or transferred to the D.C. Circuit regardless, the distinction between jurisdiction and venue makes no difference to the outcome. *Id.* at *3 n.28; *cf. EPA v. EME Homer City Generation, L.P.,* 134 S. Ct. 1584, 1602 (2014) (holding that section 7607(d)(7)(B)'s waiver requirement was not jurisdictional, but nonetheless mandatory). This is true here, just as it was in *Texas v. EPA*. There can be no question that EPA has "vigorously" objected to improper venue in the Fifth (and Tenth) Circuit. *See id.* at 1603. Dismissal or transfer is therefore required.

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[4] Petitioners incorrectly describe section 7607(b) as a "choice-of-forum" provision. Opp. at 8. Congress gave petitioners no choice at all, but instead plainly established in which federal courts of appeal a petition for review may be filed depending on the nature of EPA's action. As the statute makes plain and as the State of Texas and another petitioner here have recently acknowledged, an EPA final action that is "locally applicable" in that it applies only to Texas may be reviewed only in the D.C. Circuit if EPA makes and publishes a finding that such an action is based on a determination of nationwide scope or effect. *See* EPA Reply at 9 and Exs. A & B thereto.

B. Even if EPA's Determination is Reviewable, Such Review Should Be in the D.C. Circuit.

Even if EPA's finding were subject to review (which EPA contends it is not, *see* Mot. at 15-16), such review is only available in the D.C. Circuit. Were regional circuits to review EPA's findings that rulemakings are based on determinations of nationwide scope or effect, it would invite petitions to be filed outside of the D.C. Circuit in contravention of the statute. Indeed, a regional circuit's review of such a finding would necessarily conflict with the fact that the petition for review inviting review of the finding should never have been filed in the regional circuit in the first place.

Petitioners and Intervenors offer no explanation for why Congress would provide that a petition for review of a rule based on a determination of nationwide scope or effect may be *filed only* in the D.C. Circuit, but a regional circuit should first determine the lawfulness of EPA's determination or make a *de novo* evaluation of the basis of EPA's actions. Petitioners' argument not only finds no support in the statute, it defeats Congress' underlying policy goals of (1) specifying the D.C. Circuit as the exclusive court of review for EPA actions that are "nationally applicable" or that EPA has found are based on determinations of "nationwide scope or effect," and (2) reducing forum-shopping. *See* EPA Mot. at 13, 16-17 & n.6 (discussing legislative history).

The only question for this Court is "whether EPA has made and published a finding that the [Final Rule] is based on a determination of nationwide scope and effect." *Texas v. EPA*, 2011 WL 710598, at *3. The answer is yes. Any further inquiry would be for the D.C. Circuit alone under section 7607(b)(1).

C. This Court Should Not Rule on the Stay Motions.

Regardless of whether section 7607(b)(1)'s mandate to centralize review in the D.C. Circuit of rules with national import is jurisdictional or a mandatory venue provision, since the petitions for review here must be dismissed or transferred, the Court should not rule on the motions to stay.[5] Either way, the Court has the power to transfer the petitions and the stay motions to the D.C. Circuit. *Texas v. EPA*, 2011

[5] 28 U.S.C. §§ 2112(a)(1) and (a)(4) are inapplicable here, *see Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708-09 (6th Cir. 1975), and provide no basis for this Court to rule on the motions to stay. *See also* Doc. 513464407, EPA's Response to Sierra Club and NPCA's Motion for Reconsideration (Apr. 13, 2016) (discussing in detail why 28 U.S.C. § 2112(a) is inapplicable here).

WL 710598 at *3 n.28. The D.C. Circuit should be the only court to decide *any* issue that goes beyond the simple question of whether EPA made and published a finding that the Final Rule is based on a determination of nationwide scope or effect.

Any delay in the adjudication of the stay motions (or the petitions for review) is solely the result of Petitioners' failure to comply with the plain language of the statute, particularly where, as here, many of the Petitioners and Stay Movants are well-acquainted with section 7607(b)(1)'s forum provisions and have previously sought review directly in the D.C. Circuit in analogous situations. *See infra* at 9-10; *supra* note 4. As such, any harm the Stay Movants may allege will result from this Court not ruling on the stay motions should be disregarded. Moreover, as EPA established in its Consolidated Response in Opposition to the Motions for Stay of the Final Rule, Doc. 513456692 at 25-34, Stay Movants have failed to establish irreparable injury in the absence of a stay during the pendency of the petitions for review, let alone pending transfer and a decision by the D.C. Circuit on the motions.

All of the Petitioners here, including the Stay Movants, filed petitions for review of the Final Rule in the D.C. Circuit. The statute's direction that petitions for review of the Final Rule may be filed only in the D.C. Circuit means that the Petitioners (including the Stay Movants) who wished to challenge EPA's finding that the Final Rule is based on a determination of nationwide scope or effect were required to bring that challenge in the D.C. Circuit. Just as in *Alcoa*, 2004 WL 2713116, at *1, Petitioners could have moved to transfer their petitions for review to this Court or the Tenth Circuit, and could have presented their arguments for substantive review of EPA's finding to the D.C. Circuit. Stay Movants could have also filed their motions for stay in the D.C. Circuit. Petitioners instead chose to pursue review in the Fifth and Tenth Circuits in direct contravention of the statute. Any resulting delay in the consideration of their petitions or motions for stay that may result from the dismissal or transfer of their petitions here is therefore entirely of their own making.

III. Petitioners' Arguments Opposing Dismissal or Transfer Lack Merit.

In opposing dismissal or transfer, Petitioners make two primary arguments. First, they argue that section 7607(b)(1) requires this Court to make an independent assessment whether the Final Rule is based on a determination of nationwide scope or effect. Second, they argue that this Court should review EPA's finding *de novo* and overturn it. Both arguments are based on a fatally flawed interpretation of section 7607(b)(1) and should be rejected.

Section 7607(b)(1) states that petitions for review of a locally or regionally applicable final action "may be filed only in the [D.C. Circuit] if [Clause 1:] such action is based on a determination of nationwide scope or effect and [Clause 2:] if in taking such action the Administrator finds and publishes that such action is based on such a determination." Petitioners rely on the use of "is" and the two-clause structure in contending that the statute requires a *judicial* determination of nationwide scope or effect (Doc. 513469930, Petitioners' Joint Opposition ("Opp.") at 9-10). The first clause plainly requires that EPA's final action be based on a determination of nationwide scope or effect – such as EPA's clarified interpretations of visibility-transport provisions of the CAA and the Regional Haze Rule.[6] However, it is not sufficient for the final action solely to be based on such a determination; instead, the second clause requires that *the Administrator* must find and publish "that such action is based on such a determination." 42 U.S.C. § 7607(b)(1). The publication requirement ensures that Petitioners will know whether to file a petition for review in the appropriate regional circuit or in the D.C. Circuit by the mandatory 60-day deadline.

Indeed, multiple circuit courts have recognized that *EPA* must make the determination of nationwide scope or effect. *See, e.g.*, *PPG Indus.,* 587 F.2d at 243 n.6 (recognizing legislative history); *Nat'l Parks Conservation Ass'n v. McCarthy*, 816 F.3d 989, 993 (8th Cir. 2016) ("*EPA may determine* that the otherwise locally or regionally applicable regulations have a nationwide scope or effect *then* find and publish the determination.") (emphases added) (internal quotations and citations removed)); *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013) ("*ARTBA*") (same); *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 807 (9th Cir. 1980) ("[The D.C. Circuit] also has exclusive jurisdiction to review agency action 'based on determinations of nationwide scope or effect,' *if the action is so designated by the Administrator*.") (emphasis added).

Moreover, the Luminant Petitioners and the State of Texas have previously acknowledged EPA's authority to make such a determination. In *Luminant Generation Co. v. EPA*, No. 12-60617, Luminant told this Court:

> Notwithstanding that SIP approvals and disapprovals are quintessentially local or regional actions, *if EPA believes the basis* for particular approvals or disapprovals is a matter of nationwide scope, *it can direct review to the D.C. Circuit* by employing . . . section 307(b)(1) and "publish[ing] a

[6] As opposed to, for example, a final action that applies "only to certain development projects within the geographic jurisdiction covered." *ARTBA*, 705 F.3d at 456 (citation omitted).

> finding that the regulation is based on a determination of nationwide scope or effect." *Texas v. EPA*, 2011 WL 710598, at *3. When EPA wants to make a [nationwide scope or effect] determination, the agency knows how to do it.

Luminant Opp. at 12, Doc. 512183492 (filed Mar. 21, 2013) (emphases added) (Ex. A).[7] Luminant then cited as an example the Error Correction Rule discussed by EPA on page 9 of its Reply, *id.* at 13, and explained that "whether EPA has made a published nationwide scope determination—the issue *Texas* [*v. EPA*] did not need to address—is the question of central importance." *Id.* at 14. EPA agrees, and EPA clearly made and published such a determination here.

Petitioners' interpretation of section 7607(b)(1) is further flawed because EPA's action can only be "based" on a determination that has been made contemporaneously by the agency as part of the rulemaking at issue—not a *future* determination by a court in litigation. Otherwise EPA could not, "*in taking such action* . . . find[] and publish[] that such action is based on such a determination." 42 U.S.C. § 7607(b)(1) (emphasis added). The nonsensical nature of Petitioners' interpretation is confirmed by the very dicta they rely upon as the *only* authority in support of their interpretation. In *Texas Municipal Power Agency v. EPA*, the D.C. Circuit observed in a footnote:

> This caveat [the language in section 7607(b)(1)] allows an otherwise local action to be treated as national if it has nationwide scope and effect—precisely what was at stake in both cases. We do not know why neither case discussed this proviso. In any event, the proviso would raise additional issues—it seems to require both a court determination of scope and effect, *and* a similar published determination by the Administrator, *the mechanics of which are not obvious*—that we are not prepared to address.

89 F.3d 858, 867 n.6 (D.C. Cir. 1996) (emphasis added). This observation is plainly dicta and offers no meaningful support for Petitioners' interpretation.

Moreover, the *Alcoa* court implicitly refuted Petitioners' interpretation and the observations of the *Texas Municipal Power Agency* court. In *Alcoa*, the D.C. Circuit did not review the substance of EPA's finding that the final rule there was based on a determination of nationwide scope or effect, nor did it make its own *de novo* evaluation

[7] Texas stated in its filing that it "agrees with the legal arguments set forth in the response of [the Luminant Petitioners]." No. 12-60617, Doc. 512182627, at 2-3.

of the nature of the rule, as Petitioners urge this Court to do. Instead, the D.C. Circuit held: "the Administrator *has unambiguously determined* that the [Final Rule] has nationwide scope and effect. Accordingly, all petitions for review of this action belong in this Circuit. *See* 42 U.S.C. § 7607(b)(1)." *Alcoa*, 2004 WL 2713116, at *1 (emphasis added). Nothing more is required under the statute, and nothing more is required here.

Petitioners' further contention (Opp. at 12, 16), that section 7607(b)(1)'s use of the word "nationwide" means that the action in question must involve the entire country, also fails because it conflates the phrases "nationwide scope or effect" and "nationally applicable." "[I]t is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Reno v. Koray*, 515 U.S. 50, 56 (1995) (citation omitted). Section 7607(b)(1) provides for exclusive review in the D.C. Circuit of *locally or regionally applicable* rulemakings that EPA finds are based on a determination of nationwide scope or effect. Further, the relevant question is not whether the *Final Rule* is "of nationwide scope or effect," it is whether the Final Rule is *based* on a determination of nationwide scope or effect. Here, the Final Rule is based on EPA's clarified interpretations of the CAA's and Regional Haze Rule's visibility-transport provisions, which have "scope or effect" "nationwide" in that it applies to all States.

Petitioners' interpretation that "nationwide" means essentially the same thing as "nationally applicable" would effectively eliminate the possibility that any "locally or regionally applicable" rulemakings could ever be based on a determination of nationwide scope or effect.[8] *See Department of Revenue of Oregon v. ACF Indust.*, 510 U.S. 332, 340 (1994) (It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."); *see also Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 882 (D.C. Cir. 2015) ("Congress left no doubt that a 'nationally applicable' final action and a final action that is 'local or regionally applicable' but based on a determination of 'nationwide scope or effect' are not the same."). The

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[8] For example, if the fact that the Final Rule imposes emission limitations on power plants only in Texas were dispositive here, *see* Opp. at 1, 2, 7, 16, no locally applicable rulemaking could ever be found by EPA to be based on a determination of nationwide scope or effect. *See API v. EPA*, Nos. 09-1085, 09-1086, 2010 U.S. App. LEXIS 5744 at *4 (D.C. Cir. Mar. 15, 2010) ("To be sure, section [7607] does contemplate that locally applicable EPA actions may sometimes touch broader issues, and provides a route by which review of such actions may be diverted to this circuit."); *see also supra* at 9-10.

phrase "nationwide scope or effect" is clearly ambiguous, so EPA's interpretation, if reviewable, is entitled to the deferential review normally accorded to an agency's interpretation of a statute that it is authorized to administer. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984).

IV. Petitioners Fail to Establish that EPA's Finding Is Unreasonable.

As discussed *supra* at 5-8, this Court should not and need not inquire any further than whether EPA found and published that the Final Rule is based on a determination of nationwide scope or effect pursuant to section 7607(b)(1). But on any further inquiry, EPA's finding would be entitled to deference. *ARTBA*, 705 F.3d at 456 ("Even assuming that we can review EPA's refusal [to find and publish that the rule at issue was based on a determination of nationwide scope or effect] *under the deferential Administrative Procedure Act arbitrary and capricious standard*, *see* 5 U.S.C. § 706, it was not unreasonable for EPA to decline to make a 'determination of nationwide scope or effect' in this case.") (emphasis added). *See also*, *e.g.*, *La. Envtl. Action Network v. EPA*, 382 F.3d 575, 581-82 (5th Cir. 2004) (reviewing EPA action under deferential standard in 5 U.S.C. § 706).

EPA's finding that the Final Rule is based on a determination of nationwide scope or effect is not arbitrary or capricious, but rather is well-grounded in two reasonable bases: 1) EPA's clarified interpretations of the CAA and Regional Haze Rule's visibility-transport provisions as applied nationally, and 2) the direct applicability of the Final Rule in states in two judicial circuits. *See supra* at 3-4. Petitioners fail to rebut either basis for EPA's finding.

Petitioners confuse and conflate the Final Rule's application and the determination of nationwide scope or effect on which it is based. Opp. at 15-18. There is no dispute that the Final Rule is "regionally applicable" in that it applies to Texas and Oklahoma and regulates sources only in Texas. However, Petitioners ignore that the Final Rule clarifies EPA's interpretations of certain statutory and regulatory requirements regarding the interstate transport of visibility-impairing pollutants to guide *all* States in future regional haze rulemakings. 79 Fed. Reg. at 74,823-30; 81 Fed. Reg. at 308-09, 349; *see also* Mot. at 12, 18-20. As EPA explained in the Proposed Rule, the interstate pollution problem between Texas and Oklahoma

> demonstrates the difficulties states face when working to address air pollution problems that do not respect state borders. It also shows that some uncertainty exists as to the respective roles and responsibilities of upwind and downwind states in addressing visibility impairment in

> national parks and wilderness areas. *Consequently, we believe that it is necessary at this time to provide clarification to the states on this issue.*

79 Fed. Reg. at 74,823 (emphasis added).[9] The national significance of EPA's clarified interpretations is reflected by the comments received[10] and EPA's response thereto.[11]

EPA's clarified interpretations will apply during the rest of the first planning period, which contrary to Petitioners' claim (Opp. at 14), is still ongoing. Since the publication of the Final Rule, EPA has proposed action on a SIP revision from Utah, 81 Fed. Reg. 2004 (Jan. 14, 2016), finalized reconsideration of a FIP for Arizona, 81 Fed. Reg. 21,735 (Apr. 13, 2016), and finalized approval of a SIP revision from North Carolina, 81 Fed. Reg. 32,652 (May 24, 2016). Last year, the Third Circuit vacated EPA's approval of several aspects of Pennsylvania's regional haze SIP. *Nat'l Parks Conservation Ass'n v. EPA*, 803 F.3d 151 (3d Cir. 2015). And in *Nebraska v. EPA*, the Eighth Circuit granted EPA's request for a voluntary remand specifically for the purpose of addressing visibility transport issues. Nos. 12-3084, 12-3085 (8th Cir. Mar. 19, 2015) (Ex. B); *see also id.* EPA Motion for Partial Voluntary Remand (Feb. 6, 2015) (Ex. C).[12] Further action is therefore required of EPA on both Pennsylvania's and Nebraska's regional haze SIPs, and those proceedings may apply EPA's clarified interpretations regarding visibility transport.

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[9] Publication of the Proposed Rule and Final Rule in the Federal Register gives legal notice to anyone "subject to or affected by [the documents]," including the States. 44 U.S.C. § 1507.

[10] Multiple national stakeholders submitted comments, including national environmental groups, nearly two dozen national trade associations (e.g., Intervenor U.S. Chamber of Commerce, Certified List (Doc. 513471590) No. 0059), and national utility groups (e.g., Petitioner Utility Air Regulatory Group (Certified List No. 0065) and the Edison Electric Institute (Certified List No. 0076)).

[11] *E.g.*, 81 Fed. Reg. at 346 ("Many commenters disagreed with our interpretation of these provisions, with some providing alternative interpretations that would substantially eviscerate the Regional Haze Rule.").

[12] EPA explained in its motion: "As is relevant here, Environmental Petitioners argue that the [Nebraska] FIP's long-term strategy is deficient because it does not include measures . . . that are allegedly required to achieve reasonable progress goals established for Class I areas in South Dakota and Colorado." Ex. C at 9.

Further, EPA's clarified interpretations will guide the development of SIPs during future planning periods. As explained *supra* at 4, EPA has proposed revisions to the Regional Haze Rule that expressly rely upon, incorporate, and codify the clarified interpretations in the Final Rule. 81 Fed. Reg. at 26,952 & n.23. The clarified interpretations at issue in the Final Rule are thus of national import and should be reviewed by the D.C. Circuit to maintain national consistency, pursuant to Congress' mandate. Moreover, the revisions to the Regional Haze Rule are only a *proposal*; EPA could ultimately decide to make no changes to the regulatory text and rely solely on the interpretations that it has already made in the Final Rule instead. Finally, that EPA has proposed to revise the Regional Haze Rule to codify the clarified interpretations in no way undermines the fact that those clarified interpretations are at the core of the Final Rule, making the Final Rule "based on a determination of nationwide scope or effect" and unquestionably precedential and distinct from garden-variety SIP actions. *See* Reply at 8 (discussing *ARTBA*).

Petitioners' additional argument that EPA's finding here is unprecedented is incorrect, as demonstrated by the Error Correction Rule, among many other EPA SIP actions. *See* Reply at 9 n.8 (citing rulemakings). The Final Rule is simply the first EPA *regional haze* action that presented a situation where EPA deemed it necessary to clarify its interpretations of extensive statutory and regulatory provisions, specifically on the nationally important issue of interstate visibility transport. As EPA has explained in detail, *see* Reply at 9-10, Petitioners' reliance on the MN/MI Haze Rule as allegedly contradictory to EPA's action here is misplaced. There was no compelling reason for EPA to find that the MN/MI Haze Rule was based upon a determination of nationwide scope or effect because the taconite facilities at issue in that action were part of a unique industry located only in the upper Midwest. Further, the fact that EPA had the authority to make a nationwide-scope-or-effect determination in the MN/MI Haze Rule because it applied in multiple judicial circuits does not mean that EPA is required to make such a finding in every such case. *See Dalton Trucking*, 808 F.3d at 882.

* * *

In conclusion, for the foregoing reasons, these petitions must either be dismissed or transferred to the D.C. Circuit. Because the Clean Air Act does not permit these petitions to have been filed in this Court, the Court should further decline to rule on the motions to stay. Should the Court choose to transfer the petitions, it may transfer the fully-briefed motions to stay to the D.C. Circuit as well.

Respectfully submitted,

DATED: June 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Letter Brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: June 1, 2016

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EXHIBIT A

No. 12-60617
(and consolidated cases 12-60621 and 12-60622)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION COMPANY LLC, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

LUMINANT PETITIONERS' OPPOSITION TO INTERVENORS' MOTION TO TRANSFER

March 21, 2012

No. 12-60617
(and consolidated cases 12-60621 and 12-60622)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION COMPANY LLC, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA JACKSON, et al.,

Respondents.

UPDATED CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Balch & Bingham LLP (Counsel for Luminant Petitioners)
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- Big Brown Power Company LLC (Petitioner)
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- Coleman, Sam, Acting Regional Administrator, U.S. EPA, Region 6
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- Energy Future Competitive Holdings Company (parent company of Texas Competitive Electric Holdings Company LLC)
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- Fichthorn, Norman William (Counsel for Intervenor-Petitioner)
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- Jackson, Lisa, Administrator, U.S. EPA (Respondent)
- Keisler, Peter D. (Counsel for Luminant Petitioners)
- Louisiana Department of Environmental Quality (Petitioner)
- Luminant Big Brown Mining Company LLC (Petitioner)
- Luminant Energy Company LLC (Petitioner)
- Luminant Generation Company LLC (Petitioner)
- Luminant Holding Company LLC (Petitioner and parent company of Luminant Generation Company LLC)
- Luminant Mining Company LLC (Petitioner)
- Martella, Roger R., Jr. (Counsel for Luminant Petitioners)

- Marve, Jackie Marie (Counsel for Petitioner Louisiana Department of Environmental Quality)
- McDermott, Martin Francis (U.S. Department of Justice, Counsel for Respondents)
- Moore, Stephanie Zapata (Counsel for Luminant Petitioners and General Counsel for Luminant Generation Company LLC)
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- Robinson, Herman H. (Counsel for Petitioner Louisiana Department of Environmental Quality)
- Sandow Power Company LLC (Petitioner)
- Sidley Austin LLP (Counsel for Luminant Petitioners)
- State of Texas (Petitioner)
- Texas Commission on Environmental Quality (Petitioner)
- Texas Competitive Electric Holdings Company LLC (parent company of Luminant Holding Company LLC)
- Texas Energy Future Holdings Limited Partnership (parent organization of Energy Future Holdings Corp)
- Trahan, Donald James (Counsel for Petitioner Louisiana Department of Environmental Quality)
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Luminant Petitioners[1] oppose Intervenors National Parks Conservation Association's and Sierra Club's (collectively, "Intervenors") motion to transfer these consolidated petitions for review to the U.S. Court of Appeals for the D.C. Circuit. Transfer to the D.C. Circuit is unwarranted. Under the venue provision of the Clean Air Act governing this case, 42 U.S.C. § 7607(b)(1), the only forum in which this case can be heard is this Court. Further, it is well-established that "a person intervening on either side of the controversy may not object to improper venue." *Trans World Airlines, Inc. v. CAB*, 339 F.2d 56, 63-64 (2d Cir. 1964). Finally, even if this Court had discretion to transfer this case to the D.C. Circuit, doing so would clearly be inappropriate because Intervenors are seeking to expand the nature of the proceedings, because transfer would prejudice Petitioners' ability to obtain prompt relief, and because Intervenors waived any challenge to venue in this Circuit.

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[1] Petitioners are Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, Oak Grove Management Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company LLC, Luminant Holding Company LLC, Luminant Energy Company LLC (collectively "Luminant Petitioners"); the State of Texas and the Texas Commission on Environmental Quality ("Texas Petitioners"); and the Louisiana Department of Environmental Quality ("Louisiana Petitioners"). We refer to Luminant Petitioners, Texas Petitioners and Louisiana Petitioners collectively as "Petitioners."

BACKGROUND

The Clean Air Act creates a "federal-state partnership." *La. Envtl. Action Network v. EPA*, 382 F.3d 575, 578 (5th Cir. 2004). States have the lead role in enforcing the requirements of the Clean Air Act and promulgate State Implementation Plans ("SIPs") that set forth the detailed emissions requirements that govern regulated parties in the State. *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (citing 42 U.S.C. §§ 7407(a), 7401(a)(3)). The U.S. Environmental Protection Agency ("EPA"), however, has authority to disapprove a SIP that does not comply with the Clean Air Act or EPA's implementing rules. *Id.* (citing 42 U.S.C. § 7410(k)(3)). In certain circumstances, EPA can issue a Federal Implementation Plan ("FIP") that directly regulates State emissions sources until the State develops, and EPA approves, a SIP. 42 U.S.C. § 7410(c)(1).

Section 169A of the Clean Air Act, 42 U.S.C. § 7491, calls upon States to address "regional haze" by, among other things, adopting SIPs that require certain existing sources of air emissions to install "Best Available Retrofit Technology" ("BART"), which is a level of emissions control determined by the State. *Id.* In lieu of "source-specific" BART—*i.e.*, individualized BART requirements set for each specific facility—States can rely upon their participation in existing emissions trading programs established by federal regulation, or other alternative measures, to address their visibility obligations under the Clean Air Act. EPA previously

determined that its Clean Air Interstate Rule ("CAIR"), which is a regional trading program for electric generating units in certain States (including Louisiana and Texas), qualified as a "BART equivalent" trading program. In other words, rather than implementing BART requirements, EPA determined that States participating in CAIR could rely on CAIR to satisfy their regional haze obligations. EPA's CAIR-for-BART determination was upheld by the D.C. Circuit. *See Util. Air Regulatory Grp. v. EPA*, 471 F.3d 1333, 1339-41 (D.C. Cir. 2006).

Texas and Louisiana submitted SIP revisions to EPA to meet their regional haze obligations that relied on their participation in CAIR. EPA, however, disapproved these SIP revisions (and SIP revisions submitted by certain other States) in a final action titled "Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans" ("SIP Disapproval Order"). *See* 77 Fed. Reg. 33,642 (June 7, 2012).

EPA disapproved the revisions because EPA had—in the time since the SIP revisions were developed—promulgated a replacement trading program for CAIR, which it called the Cross-State Air Pollution Rule ("CSAPR"). 76 Fed. Reg. 48,208 (Aug. 8, 2011).[2] Relying on its promulgation of CSAPR, EPA partially

[2] On judicial review of CAIR itself, the D.C. Circuit had found the trading program to be flawed because EPA did not connect States' emissions reductions to any measure of their own "significant contributions" as required by section

disapproved the regional haze provisions of the SIPs of Texas, Louisiana, and certain other States on the ground that those SIPs could no longer rely on CAIR as an alternative measure to demonstrate compliance with regional haze requirements. Although published in a single ruling, EPA's SIP disapprovals were state-specific. The SIP Disapproval Order separately promulgated new rules for each individual State addressed in the order. *See* 77 Fed. Reg. at 33,656-59. It also adopted state-specific "remedies." For example, EPA did not impose a FIP for Texas in order to allow more time for EPA to assess Texas's regional haze submittal, given the "number of BART-eligible sources and the complexity" unique to Texas's SIP. *Id.* at 33,654. On the other hand, EPA did not impose a FIP for Louisiana because the State "requested additional time to correct the deficiencies" in its particular SIP. *Id.*

Petitioners timely sought judicial review of EPA's disapprovals of the Texas and Louisiana SIPs by this Court pursuant to the Clean Air Act, which authorizes review of any final action of the EPA "which is locally or regionally applicable" "only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C.

110(a)(2)(D)(i)(I) of the Clean Air Act. *North Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir. 2008) (per curiam). But the Court ordered EPA to keep CAIR in place pending promulgation of a replacement program. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam). As explained below, CAIR remains in place today.

§ 7607(b)(1). Petitioners only challenge in this Court EPA's action on their individual SIPs.

As noted, in disapproving Louisiana's and Texas's SIP revisions, EPA relied on its decision to replace CAIR with CSAPR. It did so despite the fact that CSAPR was stayed at that time by order of the D.C. Circuit, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (and consolidated cases) (D.C. Cir. Dec. 30, 2011) (per curiam order), ECF No. 1350421, and that EPA was required by that Court's stay order to keep CAIR in place during the pendency of the stay, *id*. Subsequently, on August 21, 2012, the D.C. Circuit vacated CSAPR as beyond EPA's statutory authority and ordered that CAIR continue to be implemented by EPA. *EME Homer*, 696 F.3d 7, 11, 38 (D.C. Cir. 2012). Four petitions for rehearing en banc (with one also seeking panel rehearing) of the *EME Homer* decision were filed on October 5, 2012. The D.C. Circuit denied the petitions in an Order dated January 24, 2013, and the mandate issued on February 4, 2013. Any petitions for a writ of certiorari are due April 24, 2013.

On September 7, 2012, Petitioners filed an unopposed motion to hold this case in abeyance pending issuance of the mandate in *EME Homer*. This Court granted that motion in its Order of September 28, 2012. On March 12, 2013, after the *EME Homer* mandate had issued, EPA filed an unopposed motion asking this Court to hold this case in abeyance until 30 days after the later of (1) the passage of

the date for filing petitions for certiorari in *EME Homer* if no petition is filed; or (2) the date the Supreme Court takes action to grant or deny any certiorari petition or petitions that have been filed, at which time this case would be returned to active status. During this 30-day period the parties anticipate working together to reach agreement on a proposal for further case management.

Although EPA has not withdrawn its disapproval of the Texas and Louisiana SIPs, it has effectively acknowledged in several related proceedings that once the D.C. Circuit's vacatur of CSAPR becomes final and nonappealable, it will need to do so. *See, e.g.*, Memorandum from Gina McCarthy, Assistant Adm'r of EPA, to Air Div. Dirs., Regions 1-10 (Nov. 19, 2012) (EPA will approve then-pending regional haze SIP based on CAIR and await resolution of *EME Homer* appeals before revisiting other SIPs already disapproved for reliance on CAIR); 78 Fed. Reg. 11,805, 11,806-07 (Feb. 20, 2013) (proposal to approve Region 4 States' SIPs for Clean Air Act's good neighbor visibility provision on the basis of CAIR, and also noting "EPA believes . . . it would be appropriate to propose to rescind its limited disapproval of [Region 4 States'] regional haze SIPs and propose a full approval" pending exhaustion of the *EME Homer* appeals process); 78 Fed. Reg. 5158 (Jan. 24, 2013) (proposal to approve Connecticut's regional haze SIP on the basis of CAIR); 78 Fed. Reg. 14,681, 14,684-85 (Mar. 7, 2013) (stating "it is appropriate for EPA to rely at this time on CAIR to support approval" of another

visibility element of Kentucky's SIP, and noting "it would be appropriate to propose to rescind [EPA's] limited disapproval of Kentucky's regional haze SIP" pending resolution of the *EME Homer* appeals process).

Intervenors now seek to transfer this case to the D.C. Circuit and consolidate them with other cases challenging EPA's SIP Disapproval Order. *See* Motion at 4-5, 9-10. Notably, however, among the petitions for review in the D.C. Circuit—and far beyond the scope of this case—are those filed by Intervenors that attack EPA's reliance on regional trading programs to meet the Clean Air Act's regional haze requirements.[3] *See* Statement of Issues, *Nat'l Parks Conservation Ass'n. v. EPA*, No. 12-1425 (D.C. Cir. Nov. 26, 2012), ECF No. 1406661 (questioning "[w]hether the Environmental Protection Agency's final action authorizing each of the 28 states participating in the trading programs established under the Cross-State Air Pollution Rule ("CSAPR") to substitute compliance with that rule for requiring certain electric generating units to install and operate the Best Available Retrofit Technology ("BART") is arbitrary, capricious, an abuse of discretion, or otherwise

[3] The State of Texas separately filed a protective petition for review in the D.C. Circuit, *Texas v. EPA*, No. 12-1344 (D.C. Cir. Aug. 6, 2012), which was consolidated with other petitions challenging aspects of the rule, including a petition filed by Intevenors. *Util. Air Regulatory Grp. v. EPA*, No. 12-1342 (D.C. Cir. Aug. 8, 2012) (order). Luminant Petitioners have intervened in these cases, in support of EPA against Intervenors' petition, and in support of Texas in its petition. *Util. Air Regulatory Grp. v. EPA*, No. 12-1342 (D.C. Cir. Sept. 25, 2012) (order).

not in accordance with law or in excess of statutory authority."); *see also* Press Release, Nat'l Parks Conservation Ass'n, *Conservation Groups Challenge Weak Air Plan for Pennsylvania* (Sept. 11, 2012) (explaining Intervenors' position that the regional haze program "'should . . . target the major polluters instead of relying on pollutant trading that will do little to clean up the parks'").[4]

ARGUMENT

I. UNDER SECTION 307(B)(1) OF THE CLEAN AIR ACT, VENUE ONLY LIES IN THE FIFTH CIRCUIT.

Transfer to the D.C. Circuit is improper because petitioners (1) challenge "locally or regionally applicable" actions by EPA, which (2) have not been declared by the agency to be based upon a determination of nationwide scope or effect. The Clean Air Act designates the regional circuits as the only appropriate venue for such petitions.

The venue provision of the Clean Air Act, section 307(b)(1), 42 U.S.C. § 7607(b)(1), distinguishes between three kinds of challenges to EPA actions. Challenges to any "nationally applicable regulations promulgated, or final action taken . . . may be filed only in the United States Court of Appeals for the District of Columbia." *Id.* On the other hand, a "petition for review of the Administrator's

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[4] *Available at* http://www.npca.org/news/media-center/press-releases/2012/conservation-groups-challenge.html.

action . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit" for the impacted region. *Id.* The statute specifically designates any action "approving or promulgating any implementation plan" (*i.e.*, a SIP) as "locally or regionally applicable," as well as any final "denial or disapproval" of such locally or regionally applicable plans. *Id.* In one special case, however, even a locally or regionally applicable action is properly reviewed in the D.C. Circuit: "if such action is based on a determination of nationwide scope or effect *and* in taking such action the Administrator finds and publishes that such action is based on such a determination." *Id.* (emphasis added).

In order for venue to lie in the D.C. Circuit, then, section 307(b)(1) "contemplates a two-step inquiry. First, we must ask whether a given regulation applies nationally or locally." And second, "where a regulation applies locally or regionally, we must also ask whether EPA has made and published a finding that the regulation is based on a determination of nationwide scope and effect." *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *3 (5th Cir. Feb. 24, 2011); *accord Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013). Here, Intervenors do not dispute that EPA's partial disapproval of Texas's and Louisiana's SIPs presents a "step 2" case.[5] Rather than contending that EPA's

[5] Nor could they. The present petitions for review involve revisions by Louisiana and Texas to their individual SIPs that would address their individual regional haze obligations by adopting a CAIR-for-BART approach, previously affirmed by the

disapprovals were themselves a nationally applicable act, Intervenors argue that the SIP denials were "*premised on* EPA's nationally applicable finding that states may rely on [CSAPR] to comply with certain Clean Air Act requirements for addressing regional haze." Motion at 6-7 (emphasis added).

Intervenors are right, insofar as they acknowledge that if venue over this case is to lie in the D.C. Circuit, it must be through "step 2" of the venue analysis. They are, however, entirely wrong that this case falls in the narrow category of EPA actions having local or regional effect but properly heard in the D.C. Circuit.

SIP decisions, as Intervenors appear to concede, are the quintessential locally or regionally applicable action. As noted, the text of section 307(b)(1) itself provides that any EPA action "approving or promulgating any implementation plan" is "locally or regionally applicable." 42 U.S.C. § 7601(b)(1). Courts likewise have recognized that SIP approvals by their very nature are "the prototypical 'locally or regionally applicable' action that may be challenged *only* in the appropriate regional court of appeals." *Am. Road*, 705 F.3d at 455 (emphasis added) (venue for challenge to California SIP approval lay in the 9th Circuit, not the D.C. Circuit); *see also ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011) (describing a SIP approval as "an undisputably [sic]

D.C. Circuit. In its SIP Disapproval Order, EPA issued revised, state-specific rules. *See supra* p. 4. EPA also took a state-specific approach as to whether or not to issue a FIP. *Id.*

regional action"); *Madison Gas & Elec. Co. v. EPA*, 4 F.3d 529, 530-31 (7th Cir. 1993) (noting challenges to SIP approvals "could be brought only in a regional circuit" because SIP approvals are "avowedly local or regional rather than national"). The legislative history of section 307(b)(1) likewise makes it clear that Congress intended that all "action in approving or promulgating state implementation plans [be] reviewable in the circuit containing the state whose plan is challenged." Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,767, 56,768 (Dec. 30, 1976), adopted by H.R. Rep. No. 95-294, at 323-24 (1977).

A necessary corollary to section 307(b)(1) identifying any action "approving or promulgating" SIPs as regionally applicable is that *partial* approvals and *disapprovals* of SIPs also are quintessentially regional actions. And the Clean Air Act so specifies. As noted, the statute recognizes that challenges to a regionally applicable "denial or disapproval," like approvals and promulgations, can only be brought in the regional circuits. 42 U.S.C. § 7607(b)(1). Accordingly, this Court has repeatedly heard challenges to both SIP approvals and disapprovals. *See Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012) (vacating disapproval of Texas SIP because of EPA's failure to provide adequate basis for action in Clean Air Act); *Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012) (upholding partial approval and partial disapproval of Texas SIP on grounds

of consistency with generally applicable Clean Air Act requirements) (en banc petition pending); *Luminant Generation Co. v. EPA*, 490 F. App'x 657 (5th Cir. 2012) (per curiam) (unpublished) (vacating disapproval of Texas SIP because of EPA's failure to provide adequate basis for action); *BCCA Appeal Grp. v. EPA*, 476 F. App'x 579 (5th Cir. 2012) (per curiam) (unpublished) (upholding disapproval of Texas SIP on grounds of failure to comply with generally applicable Clean Air Act requirements); *La. Envtl. Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004) (upholding challenge to Louisiana ozone SIP approval).[6]

Notwithstanding that SIP approvals and disapprovals are quintessentially local or regional actions, if EPA believes the basis for particular approvals or disapprovals is a matter of nationwide scope, it can direct review to the D.C. Circuit by employing the "step 2" mechanism in section 307(b)(1) and "publish[ing] a finding that the regulation is based on a determination of nationwide scope and effect." *Texas v. EPA*, 2011 WL 710598, at *3. When EPA wants to make a step 2 determination, the agency knows how to do it. For

[6] It is of no decisional significance that the SIP Disapproval Order happens to aggregate several SIP disapprovals together, since each denial, separately promulgated in 40 CFR part 52, pertains to the particular state at issue. *See Madison Gas & Elec. Co.*, 4 F.3d at 530-31 (venue for challenge to regional element of a national program lay in regional circuit; also noting challenges to SIPs are "avowedly local or regional rather than national"); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803 (9th Cir. 1980) (reviewing challenge to California portion of order, 44 Fed. Reg. 16,388 (Mar. 19, 1979), designating air quality regions in Arizona, California, Nevada, Hawaii and Guam).

example, in a recent order promulgating a FIP for greenhouse gas permitting in Texas, EPA cited section 307(b)(1)'s requirement for a published step 2 determination, and stated: "This rule is based on a determination of nationwide scope or effect." 76 Fed. Reg. 25,178, 25,208 (May 3, 2011); *see also*, *e.g.*, 75 Fed. Reg. 32,673, 32,675-76 (June 9, 2010) ("[T]he Administrator also is determining that the requirements related to these finding [sic] of failure to submit SIPs . . . is [sic] of nationwide scope and effect for the purposes of section 307(b)(1)."); 74 Fed. Reg. 58,688, 58,700 (Nov. 13, 2009) ("[T]he Administrator also is determining that the final designations are of nationwide scope and effect for the purposes of section 307(b)(1).").

Here, however, EPA has published no determination and Intervenors' motion does not suggest otherwise. That makes this a straightforward case. In the absence of a nationwide scope determination, the law is clear that venue for review of SIP approvals or disapprovals must lie in this court, not in the D.C. Circuit.

The cases Intervenors cite, far from bolstering their motion to transfer, only help to illustrate why venue is proper in this Circuit. *Texas v. EPA*, No. 10-60961, 2011 WL 710598 (5th Cir. Feb. 24, 2011), did not involve a SIP approval or disapproval. Rather, the case involved a "SIP Call" issued to thirteen States. A "SIP Call" is an instruction to States to submit revised SIPs where the existing SIPs have been found to no longer comply with a requirement of the Clean Air

Act. As such, it does not either approve or deny a SIP—such approval or disapproval comes only *after* the State responds to the SIP Call.

In *Texas v. EPA*, EPA issued a SIP Call to thirteen states, including Texas, for failing to control greenhouse gas emissions. *Id.* at *1. Unlike this case, the *Texas* court's "venue inquiry end[ed] at step one" of section 307(b)(1)'s two-step venue analysis, because the court found "the SIP Call is a nationally applicable regulation." *Id.* at *3. In holding that it was dealing with a step 1 case involving a nationally applicable action, this Court noted the crucial distinction between "EPA actions *approving* a SIP and an EPA action *calling for revisions* of an existing SIP." *Id.* at *4 (emphasis in original). The former necessarily affects only the particular State seeking SIP approval, while the latter can be a generally-applicable requirement. The *Texas* panel therefore did not need to reach the question of whether EPA had published "a finding that the SIP Call was based on a determination of nationwide scope and effect." *Id.* at *3 n.29.

Texas is thus doubly inapposite. First, this is a "prototypical" step 2 case, *Am. Road*, 705 F.3d at 455, challenging EPA's approval or disapproval of SIPs, not a generally applicable SIP Call from EPA. Second, in a step 2 case, whether EPA has made a published nationwide scope determination—the issue *Texas* did not need to address—is the question of central importance. Here, the fact that the challenged EPA action is a SIP disapproval and the fact that EPA did not make and

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publish a "nationwide" finding conclusively settles the venue question in favor of the Fifth Circuit.

The other cases Intervenors cite briefly are similarly inapposite. *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194 (10th Cir. 2011), transferred challenges to an EPA rule establishing air quality designations for most areas of the United States to the D.C. Circuit on the ground that the rule was nationally applicable—*i.e.*, a step 1 case. Notably, the Tenth Circuit analogized the rule to a SIP Call and distinguished it from the "undisputably [sic] regional action" of approving or disapproving SIPs. *Id.* at 1199. And in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 299-300 (1st Cir. 1989), the First Circuit quite understandably held that an EPA regulation interpreting a nationally applicable Clean Air Act statutory requirement was a nationally applicable, step 1-type regulation. Again, that is categorically different than the petition here challenging EPA's specific disapprovals of Texas's and Louisiana's SIPs.

In short, Intervenors seek to transfer this challenge to a quintessentially regional action to the D.C. Circuit without even claiming the statutory prerequisites for doing so have been met. The motion to transfer should be denied.

II. INTERVENORS MAY NOT CHALLENGE VENUE IN THIS COURT.

Even if the Clean Air Act did give this Court discretion to transfer, changing venue now would be improper. Foremost, "a person intervening on either side of

the controversy may not object to improper venue." *Trans World Airlines, Inc. v. CAB*, 339 F.2d 56, 63-64 (2d Cir. 1964) (refusing to consider venue challenge raised by intervenor in support of agency in petition to review agency ruling); *see also* 7C Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 3d § 1918 (2007) ("The intervenor cannot question venue."). "By voluntarily entering the action the intervenor has waived the privilege not to be required to engage in litigation in that forum." *Id.*; *see also* 6 *Moore's Federal Practice*, § 24.22[3] (3d ed.) ("A person who intervenes as plaintiff or defendant may not object to the venue chosen for the action. Since the intervenor specifically invoked the jurisdiction of the court, any potential venue objections are considered waived.").

But even if Intervenors could challenge venue in this Court, their motion still should be denied. Petitioners are presumptively entitled to remain in their chosen forum, and transfer here would be highly prejudicial. *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) ("[T]he plaintiff is generally entitled to choose the forum."); *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) ("Plaintiff's privilege to choose, or not to be ousted from, his chosen forum is highly esteemed.") (quotation omitted). Transfer of these consolidated cases would permit Intervenors to upset the case management decisions of the original parties, to expand the scope of Petitioners' case, and to delay resolution of the issues related to the Louisiana and Texas SIPs that are pending before this Court.

The original parties to this case—Petitioners and EPA—have not sought to transfer these cases to the D.C. Circuit. Instead, EPA has sought abeyance in this case pending the possible filing of petitions for certiorari in *EME Homer*. Petitioners do not oppose EPA's motion, and EPA and Petitioners have agreed to work together to reach agreement on a proposal for further case management once abeyance is lifted. Petitioners are confident that, once *EME Homer* becomes a final and non-appealable decision, they will reach agreement with EPA to have the individual SIP disapprovals either summarily vacated by this Court or remanded to the agency for the purposes of reversing those disapprovals. As explained above, EPA has recognized that its disapproval of those State SIPs which relied on CAIR cannot be sustained in light of the D.C. Circuit's vacatur of CSAPR and mandate that the agency continue to administer CAIR. *See supra* pp. 6-7.

Instead of waiting to see whether this case can be resolved efficiently and amicably after the conclusion of the appeal process in *EME Homer*, Intervenors seek to transfer these cases and consolidate them with other cases that are pending before the D.C. Circuit.[7] Critically, as explained above, among those cases are

[7] EPA has filed an unopposed motion to hold these proceedings in abeyance until the later of (a) the deadline for filing petitions for certiorari in *EME Homer* if no such petition is filed or (b) the resolution of any such petition if one is filed. Unopposed Mot. to Return Case to Abeyance Status at 1, *Util. Air Regulatory Grp. v. EPA*, No. 12-1342 (D.C. Cir. Mar. 21, 2013), ECF No. 1426559; *cf.* Motion at 6 (asserting the D.C. Circuit proceedings "are likely to move forward").

those brought by Intervenors in which they are contending that EPA's decision to allow States to rely on CSAPR to meet their regional haze obligations violates the Clean Air Act. *See supra* pp. 7-8. Petitioners believe that Intervenors intend to continue with this challenge even though the D.C. Circuit has vacated CSAPR and has squarely held that a State can rely on regional trading programs to satisfy its obligation to reduce regional haze.

But, as noted, this case does *not* concern EPA's decision that compliance with CSAPR satisfies the BART requirements of the Clean Air Act's regional haze program. Instead, Petitioners only challenge EPA's state-specific determinations that the Texas and Louisiana SIPs failed to meet the requirements of the Clean Air Act's regional haze program. Intervenors' transfer motion would result in expanding the scope of issues in this case to the separate and much broader fight with EPA that Intervenors have apparently decided to wage. That is improper. "[O]ne of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944); *see also Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) ("Except in extraordinary cases . . . intervenors 'may only join issue on a matter that has been brought before

the court by another party'. They cannot expand the proceedings.") (citations omitted).

Transfer would thus also substantially prejudice Petitioners by potentially delaying their ability to obtain relief. *Cf. Peteet*, 868 F.2d at 1436 (denial of transfer appropriate where motion to transfer would have caused delay in litigation). Transfer of the consolidated cases pending before this Court to the D.C. Circuit would subsume the narrow state-specific determinations presented in this case—issues that are fully resolved by the vacatur of CSAPR and the mandate that EPA adopt CAIR—into the claims that Intervenors intend to press before the D.C. Circuit. Petitioners should not be forced to wait to obtain complete relief on their claims pending the resolution of Intervenors' claims in a different forum.

Finally, Intervenors have waived any challenge to venue. Intervenors' motion to intervene was granted on September 28, 2012, yet Intervenors did not file the present motion to transfer until 14 days ago. Intervenors provide no explanation for this five-month delay and it is fatal to their motion to transfer. *Cf. Peteet*, 868 F.2d at 1436 ("Parties seeking a change of venue should act with reasonable promptness.") (quotation omitted); *Trans World Airlines*, 339 F.2d at 63-64 (by intervening "without simultaneously or soon thereafter raising a motion directed to venue, [intervenor] waived any defense of improper venue it may have possessed as an intervenor.").

CONCLUSION

For the foregoing reasons, Intervenors' motion to transfer should be denied.

March 21, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2013, I caused a copy of the foregoing document to be served by the Court's CM/ECF system on all counsel of record in this matter.

/s/ P. Stephen Gidiere III
Attorney for Luminant Petitioners

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3084

State of Nebraska

Petitioner

v.

United States Environmental Protection Agency and Gina McCarthy, Administrator, United States Environmental Protection Agency

Respondents

Sierra Club, et al.

Intervenors

No: 12-3085

National Parks Conservation Association and Sierra Club

Petitioners

v.

United States Environmental Protection Agency, et al.

Respondents

Nebraska Public Power District and State of Nebraska

Intervenors

Petition for Review of an Order of the Environmental Protection Administration
(EPA-R07-OAR-2012-0158)
(EPA-R07-OAR-2012-0158)

ORDER

Respondents' motion for an order remanding, without vacatur, a portion of the final action in these consolidated petitions, to allow the EPA to provide a more detailed and complete explanation of its decision is granted. It is further ordered that the motion of the Petitioners National Parks Conservation Association, et al., to set a briefing schedule and resume briefing is also granted.

The intervenors' briefs are due April 10, 2015 and the final reply briefs by NPCA and the State of Nebraska are due May 1, 2015.

March 19, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

EXHIBIT C

Nos. 12-3084, 12-3085

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GINA McCARTHY, Administrator, United States Environmental Protection Agency,

Respondents.

EPA'S MOTION FOR PARTIAL VOLUNTARY REMAND

Respondents United States Environmental Protection Agency, et al. ("EPA") hereby move the Court for an order remanding, without vacatur, a portion of the final action under review in these consolidated petitions, to allow EPA to provide a more detailed and complete explanation of its decision. A remand will also allow EPA to provide stakeholders with notice and an opportunity to comment if EPA determines that it is necessary to introduce new evidence into the record, or to change its final decision.

EPA has conferred with counsel for all other parties, and is informed that Petitioners State of Nebraska in No. 12-3084 ("State") and National Parks

Conservation Association, et al., in No. 12-3085 ("Environmental Petitioners") reserve their positions pending review of EPA's Motion for Remand.

INTRODUCTION

The petitions for review challenge a final rule issued by EPA under the Clean Air Act ("Act") partially approving and partially disapproving a State Implementation Plan ("SIP") submitted by the State of Nebraska and promulgating a Federal Implementation Plan ("FIP") to replace the disapproved portions of the SIP. See Approval, Disapproval and Promulgation of Implementation Plans; State of Nebraska; Regional Haze State Implementation Plan; Federal Implementation Plan for Best Available Retrofit Technology Determination, 77 Fed. Reg. 40,150 (July 6, 2012) ("Rule"). The State challenges EPA's partial SIP disapproval, while Environmental Petitioners challenge EPA's FIP.

As discussed in greater detail infra at 4-7, Congress has established a national goal of preventing and remedying visibility impairment in certain national parks, wildernesses, and similar areas (known as "Class I areas"). For states that contain Class I areas, state or federal implementation plans developed under the Act must include (among other provisions) "reasonable progress goals" directed at achieving natural visibility conditions at these areas. See 40 C.F.R. § 51.308(d)(1). States that do not contain any Class I areas are not required to adopt reasonable progress goals; however, their implementation plans must still include a long-term

strategy that incorporates "measures as necessary to achieve the reasonable progress goals established by" states that do contain such areas. 40 C.F.R. § 51.308(d)(3).

Environmental Petitioners argue that the long-term strategy in the partial FIP that EPA issued for Nebraska does not satisfy these requirements, in that it allegedly does not include measures necessary to achieve reasonable progress goals established by South Dakota and Colorado. See Opening Brief of National Parks Conservation Association and Sierra Club, ECF No. 4220088 ("Env. Pet. Br.") at 32-39. As explained in more detail below, in the course of reviewing Environmental Petitioners' merits brief, EPA has come to the conclusion that it did not fully explain its reasoning or fully respond to public comments regarding the FIP's alleged deficiency in this regard.

EPA therefore seeks a remand without vacatur of this aspect of the FIP, in order to provide EPA with the opportunity to revisit its rationale and, at a minimum, explain it more fully. If EPA determines that it is necessary to introduce new evidence into the record or change its final decision on remand, EPA will provide stakeholders with notice and an opportunity to comment before any final decision is reached. Because the FIP does not require the installation of any additional control technology at the sole facility to which it applies, EPA believes that vacatur of the remanded aspect of the Rule is unnecessary. Nor

would a remand affect briefing or argument as to any other aspect of the State's or Environmental Petitioners' claims, which are legally and factually distinct from the issue on which EPA seeks remand.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND.

A. Clean Air Act Overview.

The Act controls air pollution through a system of shared federal and state responsibility. See Gen. Motors Corp. v. United States, 496 U.S. 530, 532 (1990). In general, EPA establishes standards that protect air quality, and states implement those standards through SIPs. States must submit SIPs and SIP revisions to EPA for approval, and EPA is required to review each submission to determine if it "meets all of the applicable requirements of [the Act]." 42 U.S.C. § 7410(k)(3); see also North Dakota v. EPA, 730 F.3d 750, 766 (8th Cir. 2013), cert. denied, 134 S. Ct. 2662 (2014). If a state fails to fulfill its obligation to submit a SIP that meets applicable statutory and regulatory requirements, the Act provides a backstop of federal controls. Thus, if EPA disapproves a SIP in whole or in part, EPA must promulgate a FIP in place of any disapproved portion of the SIP within two years (unless EPA first approves a state's correction of the deficiencies in its SIP). See 42 U.S.C. § 7410(c)(1)(B).

B. Visibility Protection Under the Act.

Congress enacted Section 169A of the Act, 42 U.S.C. § 7491, in 1977 "[i]n response to a growing awareness that visibility was rapidly deteriorating in many places . . . set aside for special protection in their natural states . . . ." Chevron U.S.A., Inc. v. EPA, 658 F.2d 271, 272 (5th Cir. 1981). At that time Congress declared as a national goal "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from man-made air pollution." 42 U.S.C. § 7491(a)(1).[1] In the 1990 Amendments to the Act, Congress added Section 169B, 42 U.S.C. § 7492, to focus attention on regional haze – that is, visibility impairment caused by emissions from multiple sources and activities located across a broad geographic area. See 40 C.F.R. § 51.301; see also 77 Fed. Reg. 12,770, 12,771 (Mar. 2, 2012).

C. BART and BART Alternatives.

The Act's visibility protection provisions state that SIPs must require certain "major stationary sources" that "emit[] any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility" to "procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology ["BART"]. . . . " 42 U.S.C. § 7491(b)(2)(A); 40

[1] Class I federal areas include certain national wilderness areas, national memorial parks, and national parks. 42 U.S.C. § 7472. "Impairment of visibility" means "reduction in visual range and atmospheric discoloration." Id. § 7491(g)(6).

C.F.R. § 51.301. BART is "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction" for visibility-impairing pollutants emitted by certain stationary facilities. 40 C.F.R. § 51.301. This emission limit must be established case-by-case, taking five statutory factors into consideration.[2]

EPA's Regional Haze Rule, which implements the Act's visibility protection provisions, provides states with an alternative to requiring source-specific BART controls. Specifically, a state need not require sources to install BART controls if that state "demonstrates that an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions." 40 C.F.R. § 51.308(e). In June 2012, EPA determined that the emission trading programs in EPA's Cross-State Air Pollution Rule (the "Transport Rule") "achieve greater reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas than source-specific [BART]" in Transport Rule states. 77 Fed. Reg. 33,642, 33,643 (June 7, 2012); see also 76 Fed. Reg. 82,219, 82,224-29 (Dec. 30, 2011). EPA thus amended the Regional Haze Rule, which now provides in pertinent part that states that participate in Transport Rule trading

[2] The BART factors are (a) the costs of compliance; (b) the energy and non-air quality environmental impacts of compliance; (c) any existing pollution controls in use at the source; (d) the remaining useful life of the source; and (e) the predicted visibility improvements from use of controls. 42 U.S.C. § 7491(g)(2).

programs "need not require BART-eligible fossil fuel-fired steam electric plants in the State to install, operate, and maintain BART for the pollutant covered by such trading program in the State." 40 C.F.R. § 51.308(e)(4). This nationwide provision is known as the "better-than-BART" rule.[3]

D. Reasonable Progress Goals and the Long-Term Strategy.

States that contain Class I areas must include in their SIPs "goals . . . that provide for reasonable progress towards achieving natural visibility conditions" ("reasonable progress goals") at each Class I area within a state. 40 C.F.R. § 51.308(d)(1). At a minimum, reasonable progress goals "must provide for an improvement in visibility for the most impaired days over the period of the [SIP] and ensure no degradation in visibility for the least impaired days over the same period." Id. States that do not contain Class I areas are not required to adopt reasonable progress goals. See id. In recognition of the fact that air pollution does not respect state boundaries, however, such states must still include in their SIPs "a long-term strategy that addresses regional haze visibility impairment for . . . each mandatory Class I Federal area located outside the State which may be affected by emissions from the State." 40 C.F.R. § 51.308(d)(3).

[3] The Transport Rule and the better-than-BART rule are more fully discussed in EPA's concurrently-filed brief on the merits, at 9-11.

II. FACTUAL BACKGROUND.

Nebraska submitted a regional haze SIP revision to EPA on July 13, 2011. 77 Fed. Reg. at 12,775. Included in this SIP revision was a BART determination for sulfur dioxide ("SO_2") emissions from the Gerald Gentleman Station (the "Station," or "GGS"), a Nebraska electric power plant. See Nebraska Department of Environmental Quality State Implementation Plan for Regional Haze and [BART], State of Nebraska's Appendix at 513, 519. In July 2012, EPA disapproved this determination, finding significant flaws in several aspects of the State's analysis of potential emission control technologies. See generally 77 Fed. Reg. at 12,779-80; 77 Fed. Reg. at 40,160-63; Brief of Respondent EPA (filed concurrently on Feb. 6, 2015) at 13-15, 25-33. EPA also disapproved the State's long-term strategy to the extent that it relied on this flawed BART determination. 77 Fed. Reg. at 40,155.

EPA promulgated a FIP in place of those elements of the SIP that it disapproved. See 77 Fed. Reg. at 40,151. EPA invoked the better-than-BART rule, opting to "rely[] on the Transport Rule as an alternative to BART for SO_2 emissions from the [Station]." 77 Fed. Reg. at 12,781; see also 77 Fed. Reg. 40,163-64. EPA further found that the gaps left in the State's long-term strategy by EPA's partial disapproval were "addressed [in EPA's FIP] through reliance on

the Transport Rule as an alternative to BART for SO_2 emissions from the [Station]." 77 Fed. Reg. at 12,776; see also 77 Fed. Reg. at 40,151.

The State and Environmental Petitioners filed petitions for review of various aspects of the Rule. In general, the State challenges EPA's partial SIP disapproval, while Environmental Petitioners challenge elements of the FIP.[4] As is relevant here, Environmental Petitioners argue that the FIP's long-term strategy is deficient because it does not include measures – specifically, the requirement that the Station install certain emission controls – that are allegedly required to achieve reasonable progress goals established for Class I areas in South Dakota and Colorado. See Env. Pet. Br. at 32-39.

ARGUMENT

I. STANDARD FOR GRANTING VOLUNTARY REMAND WITHOUT VACATUR.

"A reviewing court has inherent power to remand a matter to the administrative agency." Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1127 (9th Cir. 1983); see also Ramirez-Peyro v. Gonzales, 477 F.3d 637, 642 (8th Cir. 2007) ("'Generally speaking, a court of appeals should remand a case to an agency for

[4] The Nebraska Public Power District ("District") also filed a petition for review. See Nebraska Public Power District v. EPA, No. 12-3061. The District has since dismissed its petition, but remains as an intervenor in No. 12-3085. See October 4, 2014, Motion for Voluntary Dismissal of Petition for Review in No. 12-3061, ECF No. 4205810, at 3; November 4, 2014, Judgment in No. 12-3061, ECF No. 4213133;

decision of a matter that statutes place primarily in agency hands.'" (citing INS v. Ventura, 537 U.S. 12, 16 (2002)). It is, moreover "generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." Macktal v. Chao, 286 F.3d 822, 825-26 (5th Cir. 2002); see also Trujillo v. Gen. Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980) (noting that "the power to decide in the first instance carries with it the power to reconsider"). This authority includes the right to seek voluntary remand of a challenged agency decision, without confessing error. SKF USA Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001). For example, an agency may seek remand because it wishes to reconsider its interpretation of the governing statute, the procedures it followed in reaching its decision, or the decision's relationship to other agency policies. Id. In addition, if an agency has not provided a "reasoned explanation" for its action, "it is appropriate to remand to the agency for further proceedings." Qwest Corp. v. F.C.C., 258 F.3d 1191, 1201 (10th Cir. 2001).

While the reviewing court has discretion over whether to remand, voluntary remand is appropriate where the request is reasonable and timely. See Macktal, 286 F.3d at 826. "'Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.'" B.J. Alan Co. v. ICC, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990)

(quoting Commonwealth of Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). As the D.C. Circuit has stated, "[w]e commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993). In sum, "'if the agency's concern is substantial and legitimate, a remand is usually appropriate.'" Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta, 375 F.3d 412, 417 (6th Cir. 2004) (citing SKF USA Inc., 254 F.3d at 1029).

In determining whether to remand without vacating the agency's decision, the court considers "the seriousness of the . . . deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation omitted).

II. REMAND WITHOUT VACATUR IS APPROPRIATE.

EPA asks the Court to remand the FIP's long-term strategy for Nebraska, and the cases cited above indicate that such a request should ordinarily be granted. To be clear, EPA does not concede that this aspect of EPA's final action was erroneous. However, EPA has come to the conclusion that EPA did not fully explain its reasoning on the specific issues raised by Environmental Petitioners at

the time that EPA promulgated the FIP, and may not have fully responded to comments on this issue. Among other things, EPA is concerned that its present explanation could potentially be construed in a manner that is inconsistent with EPA's interpretation of the relevant statutory and regulatory requirements. Remand is therefore appropriate so that EPA has the opportunity to amend or further explain its rationale for declining to require additional controls as part of the FIP's long-term strategy, to more fully respond to comments submitted by the public, and to take further action if necessary.

EPA's requested remand would not prejudice any party. If EPA determines that it is necessary to introduce new evidence into the record or change its final decision, EPA will provide stakeholders with notice and an opportunity to comment before any final decision following the remand is reached. Any final action on remand would be subject to judicial review pursuant to 42 U.S.C. § 7607(b)(1). The Environmental Petitioners' challenge to the FIP's long-term strategy is, moreover, factually and legally distinct from the State's and Environmental Petitioners' remaining challenges to the Rule in this matter, all of which may proceed independently.

Nor is vacatur necessary with this voluntary remand. The FIP's long-term strategy does not require installation of additional controls at the Station, or any

other actions that might ultimately prove unnecessary if the remand resulted in a different decision.

CONCLUSION

For the foregoing reasons, EPA's final action with regard to the long-term strategy for Nebraska should be remanded to EPA without vacatur.

Respectfully submitted,

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/s Angeline Purdy

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Lenexa, KS

Date: February 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2015, copies of the foregoing Motion for Remand were filed with the Court's CM/ECF system, which will electronically serve all counsel of record.

/s Angeline Purdy

Angeline Purdy